

**TCEQ AIR QUALITY PERMIT NOS. 51770 & PSD-TX-486M3
TCEQ DOCKET NO. 2012-2138-AIR**

APPLICATION BY	§	BEFORE THE
LOWER COLORADO	§	TEXAS COMMISSION
RIVER AUTHORITY	§	ON
FAYETTE POWER PROJECT	§	ENVIRONMENTAL
FAYETTE COUNTY, TEXAS	§	QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director of the Texas Commission on Environmental Quality (Commission or TCEQ) files this response (Response) to the requests for a contested case hearing submitted by nine individuals and two environmental groups on behalf of one member each. The Texas Clean Air Act (TCAA), Tex. Health & Safety Code § 382.056(n) requires the commission to consider hearing requests in accordance with the procedures provided in Texas Water Code § 5.556.¹ This statute is implemented through the rules in 30 Texas Administrative Code (TAC) Chapter 55, Subchapter F.

A compliance history report, technical review summary, and draft permit prepared by the Executive Director's staff are filed concurrently with the TCEQ's Office of Chief Clerk for the Commission's consideration.² In addition, the Executive Director's Response to Public Comments (RTC), which was mailed by the chief clerk to all persons on the mailing list, is on file with the Chief Clerk for the Commission's consideration.

This is the first application is that is a de-flex application to come before the Commission, and it may be the first opportunity for the Commission to consider hearing requests on an application was not subject to the notice requirements of 30 TAC Chapter 39. The nature of the application and its procedural background are provided, followed by a discussion of the applicable law and application of the law to the facts of this case with regard to the nature of and the specific hearing requests made regarding this application.

I. Application Request and Procedural Background

A. General Description of the Application and Description of Facilities Authorized

The Lower Colorado River Authority (LCRA) applied to the TCEQ for amendments to New Source Review (NSR) permits under TCAA § 382.0518 and 30 TAC Chapter 116, for facilities at its Fayette Power Project (FPP). FPP is located seven miles east of LaGrange on Highway 71, Fayette County. The application requests amendment of both Permit No. 51770 and Permit No. PSD-TX-486M3, and the purpose of the application is to convert the existing authorization for the facilities at FPP, under Permit 51770, from a permit issued under 30 TAC Chapter 116, Subchapter G to an air quality permit issued under 30 TAC Chapter 116, Subchapter B. The

¹ Statutes cited in this Response may be viewed online at www.capitol.state.tx.us/statutes/statutes.html. Relevant statutes are found primarily in the Texas Health & Safety Code and the Texas Water Code. The rules in the Texas Administrative Code may be viewed online at www.sos.state.tx.us/tac/index.shtml, or follow the "Rules, Policy & Legislation" link on the TCEQ website at www.tceq.state.tx.us.

² These are accessible on the Agendas and Work Sessions web page at: http://www.tceq.state.tx.us/comm_exec/agendas/.

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permit document for FPP includes both the de-flexed minor NSR permit and Prevention of Significant Deterioration (PSD) Permit PSD-TX-486M3. FPP is also subject to Plant-Wide Applicability Limit (PAL) Permit PAL 2.

LCRA's application was submitted in response to requests from the Environmental Protection Agency (EPA) Region 6 that holders of Flexible Permits issued under TCEQ rules in 30 TAC Chapter 116, Subchapter G convert those permits to permits issued under a State Implementation Plan (SIP) approved permit program. LCRA's options included a permit amendment³ or permit alteration.⁴ LCRA chose to file a permit amendment. In addition, EPA stated that it wanted de-flex applications to be subject to public notice and comment. Although the TCEQ's public notice requirements were not triggered because there will be no increase in emissions and no new air contaminants emitted, LCRA complied with EPA's request by electing to comply with public participation requirements in 30 TAC Chapter 39, as discussed below.

LCRA did not request authorization of any new construction or air contaminants, or any increases in emissions. This permit amendment, if issued, will not authorize new construction or any changes to existing equipment, nor authorize an increase in emission limits. This amendment will establish individual unit emission limits that are less than or equal to the caps that are in the flexible permit. For any pollutants for which the sum of the proposed individual unit emission limits exceeds the flexible permit emission caps, compliance caps are being established that are less than or equal to the current flexible permit caps to ensure that the permit action does not result in an increase in allowable emissions. Therefore, the permit action is administrative in nature.

FPP consists of three pulverized coal steam electric generating units currently fired with low sulfur sub-bituminous coal. The gross generating capacity of Units 1, 2, and 3 is approximately 650 megawatts (MW), 640 MW, and 470 MW respectively. All three utility boilers are equipped with low NO_x burners and over fired air systems to minimize emissions of oxides of nitrogen (NO_x). Flue gas from each of the utility boilers is routed through an electrostatic precipitator (ESP) for particulate control. Flue gas from each of the three utility boilers is also routed through a wet scrubber that removes sulfur dioxide (SO₂) and other acid gases, before the flue gas is exhausted through a stack to the atmosphere. Fly ash removed by the ESP is collected in hoppers and pneumatically conveyed to storage silos prior to loading for disposal or sales. FPP also consists of ancillary coal, limestone, and ash material handling facilities that are controlled by baghouses, foam suppression, sprays, and enclosures. Contaminants authorized under this permit include NO_x, SO₂, carbon monoxide (CO), particulate matter (PM) including particulate matter with diameters of 10 microns or less (PM₁₀) and 2.5 microns or less (PM_{2.5}), sulfuric acid (H₂SO₄), and lead (Pb).

Although this application is administrative in nature, the flexible permit required LCRA to make significant reductions in emissions from what was allowed by the legacy permits for FPP permits (those existing prior to the issuance of the flexible permit). The Technical Review provides additional detail about the emission limits in the legacy permits as well as in the proposed de-flexed permit.

³ 30 TAC § 116.116(b).

⁴ 30 TAC § 116.116(c).

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B. Procedural Background

The application was received on January 31, 2011, and declared administratively complete on April 15, 2011. Although compliance with TCEQ's public notice requirements in 30 TAC Chapter 39 is not required for this application, LCRA voluntarily elected to publish notice and post signs to notify the public of this application. The Notice of Receipt and Intent to Obtain an Air Quality Permit for this amendment application was published in the *Fayette County Record* on April 22, 2011. The Notice of Application and Preliminary Decision for an Air Quality Permit for this application was published in the *Fayette County Record* on May 15, 2012. These notices provided the opportunity to submit comment and to request a contested case hearing and a public meeting. State Representative Eddie Rodriguez and some commenters requested a public meeting, which was held in LaGrange on June 14, 2012. LCRA participated in the meeting. Hearing requests were received in response to the notices and at the public meeting.

The RTC was filed and mailed on September 20, 2012 to all interested persons, including those who asked to be placed on the mailing list for this application and those who submitted comment or requests for contested case hearing with the agenda setting letter. The cover letter to the RTC provided information about filing a response to hearing requests. No hearing requests were received in response to the RTC.

As of November 9, 2012, LCRA is not delinquent on any administrative penalty payments or fees to the TCEQ.

II. APPLICABLE LAW

A. No Increase Air Quality Permit Applications

The publication of the opportunity to request a contested case hearing and the consideration of any such requests are governed by Tex. Health & Safety Code § 382.056, and the rules implementing that statute in 30 TAC Chapters 39, 50 and 55. Specifically, TCAA § 382.056(a) requires notice of application for a permit amendment, but subsection (g) provides that the commission may not hold a hearing in response to a request for a hearing on an amendment application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant previously emitted. The Commission implements this statute in 30 TAC §55.201(i)(3)(C).

B. Compliance History Rules

Tex. Health & Safety Code § 382.056(o) provides that the commission may hold a hearing on a permit amendment application if the commission determines that the application involves a facility for which the applicant's compliance history is in the lowest classification under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections.⁵ This is also implemented in 30 TAC §55.201(i)(3)(C).

⁵ See also 30 TAC § 55.201(i)(3)(C) (stating the commission may hold a hearing if the application "involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations").

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Certain compliance history must be considered in the review of a permit amendment application,⁶ and that is documented in the Technical Review document provided to the Commission. The commission adopted 30 TAC, Chapter 60 to evaluate compliance history.

C. Commission Rules for Contested Case Hearing Requests

The commission must assess the timeliness and form of the hearing request, noted above. The form requirements are set forth in 30 TAC § 55.201(d):

(d) A hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requester's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requester believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requester should, to the extent possible, specify any of the executive director's responses to comments that the requester disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

The next necessary determination is whether the requests were filed by "affected persons," pursuant to TWC § 5.115 and 30 TAC § 55.203(a). An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Local governments with authority under state law over issues raised by the application receive affected person status under 30 TAC § 55.203(b).

In determining whether a person is affected, 30 TAC § 55.203(c) requires all factors be considered, including, but not limited to, the following:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and

⁶ Tex. Health & Safety Code § 382.0518(h) and 30 TAC § 116.110(c).

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- the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

In addition to the requirements noted above regarding affected person status, in accordance with 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.⁷

III. ANALYSIS OF HEARING REQUESTS

A. Amendment Application with No Increase in Emissions or New Air Contaminants

Although the purpose of this application is one of first impression for the commission, the analysis of this “de-flex” application is consistent with analyses in previous filings by the Executive Director regarding consideration of hearing requests regarding a “no increase” amendment application, as required by TCAA § 382.056(g) and 30 TAC § 55.201(i)(3)(C). This application does not request an increase in emissions or the emission of any air contaminants not previously authorized to be emitted, and thus meets the requirements for issuance without being subject to a contested case hearing. The Executive Director finds that there is no right to a contested case hearing for this application as a matter of law.

B. Compliance History

This permit application was received after September 1, 2002, and before September 1, 2012, and the company and site have been rated and classified pursuant to Title 30, Chapter 60 of the Texas Administrative Code.⁸ The lowest classification under the Texas Water Code §§ 5.753 and 5.754 and 30 TAC § 60.2 for applications received for that time period is a “poor performer.” Under 30 TAC § 60.3(a)(3)(B), the TCEQ may hold a hearing on an air permit renewal if the site is classified as a poor performer. The compliance history for the company and the site is reviewed for the five-year period prior to the date the permit application was received by the Executive Director.

A company and site may have one of the following classifications and ratings:

High: rating < 0.10 (above-average compliance record)

Average by Default: rating = 3.01 (these are for sites which have never been investigated)

⁷ 30 TAC § 55.205(a)

⁸ 30 TAC § 60.1(a)(6).

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Average: $0.10 < \text{rating} < 45$ (generally complies with environmental regulations)
Poor: $45 < \text{rating}$ (performs below average)

This site has a rating of 0.1 and a classification of average. The company rating and classification, which is the average of the ratings for all sites the company owns, is 2.8, which is also average. These ratings are noted in both the Technical Review and the RTC.

Although this application is subject to the former rating system, currently only reports utilizing the new rating system can be accurately generated; a current compliance history report is concurrently filed as backup for the commission's consideration. This report shows a site rating of 0.00 (high) and a company rating of 0.65 (satisfactory).

Therefore, the company and this site each have been classified as "average" under the former system and "satisfactory" and "high" under the new system, and are not "poor" performers under either system. Therefore, a hearing should not be granted under Tex. Health & Safety Code § 382.056(o) and 30 TAC § 55.201(i)(3)(C) based on LCRA's compliance.

C. Hearing Requests

Although the Executive Director's position is that there is no legal right to a contested case hearing for this application as a matter of law, the Executive Director has analyzed the requests for contested case hearing filed by nine individuals, and by two organizations on behalf of one member each.

1. Were the requests for a contested case hearing in this matter timely and in proper form?

All eleven requests were timely, specifically requested a contested case hearing, and included a physical address for the requestors. Most of the requests did not include issues that were relevant to the de-flex application. That analysis is presented by responses to four basic questions:

2. Are the individuals who requested a contested case hearing in this matter affected persons?

The commission must consider whether a reasonable relationship exists between the interest claimed and the activity regulated. The activity the commission regulates is the authorized emission into the air of contaminants by a person who owns or operates a facility or facilities. Those persons who own or operate a facility or facilities are prohibited from emitting air contaminants or performing any activities that contravene the TCAA or any other commission rule or order, or that causes or contributes to air pollution.

The interests claimed by these nine persons are not within the scope of an air quality NSR authorization because they do not relate to the any potential adverse effects from air contaminants emitted by FPP. Although some of the commenters expressed concern regarding issues relating to specific types of emissions and air quality generally, both in the vicinity of FPP and in the State of Texas, those comments are insufficient to establish that they may be affected persons. None of the requestors provided information as to how they have a personal justiciable

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interest affected by the application or the emissions from FPP, and how this interest is different from that of the general public.

In addition, because this application is administrative in nature, and does not request any increase in the amount of emissions, any change in the character of the emissions, nor any change in operation of FPP, the Executive Director finds that there is no basis to consider the effects of the emissions on the requestors. However, an analysis of any possible adverse effect of the emissions on these requestors has been made.

Because emissions from FPP disperse in the air as the distance from the emissions points increases, distance from the proposed facility is key to the issue whether or not there is a likely impact of the regulated activity on a person's interests such as the health and safety of the person, and on the use of property of the person disperse in the air the further they live from FPP. Mr. Cook's residence is 7.9 miles from FPP, and the remaining individual requestors live more than 50 miles from FPP. Due to these distances, none of these persons are likely to be impacted by the authorized emissions from FPP differently than any other member of the general public. Due to their distance from the proposed facility, these requestors (except Mr. Cook) are not shown on the attached map.

A list of those requestors' locations and a summary of their requests is provided below:

Jeff Cook – LaGrange

His written request merely states he requests a hearing; no information about how he might be impacted was provided.

Jeffrey Crunk – Austin

He did not provide any information about how he might be impacted. He filed comments about the inadequacy of the draft permit and concerns about the use of coal generally in Texas and in the United States, and thus do not support his hearing request.

Susan Pantell – Austin

She did not provide any information about how she might be impacted. She expressed a general concern regarding increases in the emission levels of particulate matter, hazardous air pollutants and lead.

Valerie Thatcher – Austin

She did not provide any information about how she might be impacted. Her comments concerned costs to citizens passed on by coal plants, and that she was concerned that citizens are impacted by higher expenses for health and the cost of food, as well as degradation in personal welfare.

Darelle E. Robbins – Houston

She did not provide any information about how she might be impacted, but rather expressed a general concern for the health of the local community and the state.

Janice VanDyke Walden – Houston

She did not provide any information about how she might be impacted. Her written request merely stated that she requests a CCH; she made no formal public comment.

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John Mikus – Houston

Mr. Mikus provided a Houston address, and also stated that he owns land in Fayette County, but he did not provide the location or details of how he or his Fayette County property would be impacted. His comments concerned use of coal generally and how wind would be an alternative source of energy, use of water (especially by coal plants during times of drought), and concerns regarding effects of ultrafine particulate matter emissions.

Raul Bustillo - Bay City

He did not provide any information about how he might be impacted. His comment states he requests a hearing regarding the planned relaxation and lowering of pollution laws for the FPP, and because the coal industries are causing environmental damage that is more costly than the money they generate. He also stated that more protection from dirty polluters is needed.

Allison Sliva - Bay City

She did not provide any information about how she might be impacted. Her written hearing request merely states that she lives downstream of LaGrange on the Colorado River and is concerned about mercury contamination. She also stated that she is concerned about air pollution because the air does not respect county lines.

In conclusion, the Executive Director finds that no reasonable relationship exists between the interest claimed and the activity the commission regulates, and that the nine individual requestors are not affected persons.

3. Do the groups who requested a hearing meet the group or associational standing requirements?

Both Sierra Club and Texas Campaign for the Environment (TCE) filed hearing requests. Sierra Club's goals include preserving and enhancing the natural environment and protecting public health, and the specific goal of improving outdoor air quality. The Sierra Club and its members have a significant interest in ensuring that the LCRA Fayette plant complies with the Clean Air Act and reduces air emissions that endanger public health and property, and also have an interest in ensuring that the permit for FPP complies with applicable law. Sierra Club's named member is Carol Daniels. The request states that she lives less than 10 miles from FPP, and that she has concerns about air quality at her home and in her community. Specifically, air pollution harms her health and property, and interferes with her normal use and enjoyment of her property. She would like FPP to comply with all air pollution laws and have an air permit that protects public health and the environment. Her residence is located approximately 11.5 miles from the stacks at FPP, as shown on the attached map.

TCE is an organization dedicated to informing and mobilizing Texans to protect their health, their communities and the environment, and has participated in numerous actions over the years to reduce air pollution. TCE has members and staff that live, work, own property and recreate in the vicinity and directly downwind of FPP. TCE's named member is Maggie Rivers. The request states that she lives in Round Top, approximately six miles north of FPP. The hearing request letter states that Ms. Rivers believes that air pollution from FPP causes or contributes to her asthma. She has seen sooty ash on her property and vehicles, consistent with the prevailing winds from the direction of FPP. Her residence is located approximately 5.1 miles from the stacks at FPP, as shown on the attached map.

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As discussed above, the commission must consider distance restrictions or other limitations imposed by law on the affected interest, the likely impact of the regulated activity on the health and safety of the person, and on the use of the property of the person, and the likely impact of the regulated activity on the use or the impact natural resource by the person. For Air authorizations, distance from the proposed facility is particularly relevant to the issue of whether or not there is a likely impact of the regulated activity on a person's interests because of the dispersion and effects of individual air contaminants emitted from a facility. Because of the dispersion of the air contaminants and the relative distances from FPP, neither of these persons is likely to be impacted differently than any other member of the general public. Neither Ms. Daniels nor Ms. Rivers have demonstrated that they would have standing to request a hearing in their own right.

Although both organizations' interests they seek to protect are germane to the organization's purpose and the organizations may be able to participate without the participation of the named members, neither of the named members have standing in their own right to a contested case hearing. Therefore, the Executive Director finds that neither Sierra Club nor TCE meet the requirements of 30 TAC § 55.03 for group standing.

4. Which issues in this matter should be referred to SOAH for hearing?

If the commission determines a hearing request is timely, fulfills the requirements for proper form, and the hearing requester is an affected person, the commission must then apply a three-part test⁹ to the issues raised in the matter to determine if any of the issues should be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

Because the Executive Director has determined that there is no right to a hearing as a matter of law, and because none of the requestors are affected persons, no analysis of the requestors' comments has been made to determine if the comments raise issues that involve disputed questions of fact or are relevant and material to the decision on the application.

IV. Conclusion

The amendment of this permit would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. Under these circumstances, Tex. Health & Safety Code § 382.056(g) directs the Commission to "not seek further comment or hold a public hearing." Although consideration of hearing requests on a "no increase" renewal application is governed by Tex. Health & Safety Code § 382.056(g) and (o), this Response provides an analysis of the individual hearing requests that demonstrates that none of the requestors are affected persons.

Accordingly, the Executive Director respectfully recommends that the commission determine that there is no right to a contested case hearing for this application, find that the hearing requestors are not affected persons, and deny the hearing requests as a matter of law. The Executive Director further recommends the Commission approve the amendment application and issue the amended permit.

⁹ 30 TAC § 50.115(c).

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Respectfully submitted,

Texas Commission on Environmental Quality

Zak Covar
Executive Director

Caroline M. Sweeney, Deputy Director
Office of Legal Services

Robert Martinez, Division Director
Environmental Law Division



Janis Boyd Hudson, Attorney
Environmental Law Division
Texas Bar No. 10157400
Representing the Executive Director of the Texas
Commission on Environmental Quality

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CERTIFICATE OF SERVICE

On November 12, 2012, a true and correct copy of the foregoing instrument was served on all persons on the attached mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, electronic transmission or hand delivery.



Janis Boyd Hudson

MAILING LIST
LOWER COLORADO RIVER AUTHORITY
DOCKET NO. 2012-2138-AIR; PERMIT NOS. 51770, PSD-TX-486M3

FOR THE APPLICANT: Andrew Valencia, Manager Power and Gas Operations Lower Colorado River Authority
104 East State Highway 71 Bypass
La Grange, Texas 78945-4445

Joe Bentley, Environmental Advisor
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Janis Hudson, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Erik Hendrickson, P.E., Technical Staff
Texas Commission on Environmental Quality
Air Permits Division, MC-163
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-1095
Fax: (512) 239-1300

Brian Christian, Director
Texas Commission on Environmental Quality
Small Business and Environmental Assistance Division
Public Education Program, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-5678

FOR PUBLIC INTEREST COUNSEL
via electronic mail:

Mr. Blas J. Coy, Jr., Attorney
Texas Commission on Environmental Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6363
Fax: (512) 239-6377

FOR ALTERNATIVE DISPUTE RESOLUTION
via electronic mail:

Mr. Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

Ms. Bridget C. Bohac

Texas Commission on Environmental
Quality

Office of Chief Clerk, MC-105

P.O. Box 13087

Austin, Texas 78711-3087

Tel: (512) 239-3300

Fax: (512) 239-3311

REQUESTER(S)

RAUL P BUSTILLO
3909 AGGIE DR
BAY CITY TX 77414-4613

GABRIEL CLARK-LEACH
1303 SAN ANTONIO ST STE 200
AUSTIN TX 78701-1636

JEFFREY COOK
712 N MAIN ST
LA GRANGE TX 78945-1636

JEFFREY FRITZ CRUNK
9012 SOMMERLAND WAY
AUSTIN TX 78749-4269

ILAN LEVIN
ENVIRONMENTAL INTEGRITY PROJECT
1303 SAN ANTONIO ST STE 200
AUSTIN TX 78701-1636

JOHN W MIKUS
8118 NEFF ST
HOUSTON TX 77036-6312

MS SUSAN PANTELL
403 W ODELL ST
AUSTIN TX 78752-2407

MS DARELLE E ROBBINS
1912 MCDUFFIE ST
HOUSTON TX 77019-6132

ALLISON SLIVA
42 VALHALLA DR
BAY CITY TX 77414-7357

VALERIE THATCHER
1193 CURVE ST
AUSTIN TX 78702-1955

JANICE VAN DYKE WALDEN
220 W 34TH ST
HOUSTON TX 77018-7610

PUBLIC OFFICIALS - INTERESTED PERSON(S)

THE HONORABLE EDDIE RODRIGUEZ
TX HOUSE OF REPRESENTATIVES - DIST 51
PO BOX 2910
AUSTIN TX 78768-2910

INTERESTED PERSON(S)

MARCIE ALEXANDER
ENVIRONMENTAL INTEGRITY PROJECT
1303 SAN ANTONIO ST STE 200
AUSTIN TX 78701-1636

CLINT W BUSHACKED
1024 S RAYMOND RD
LA GRANGE TX 78945-5320

DONALD CERNOSEK
10048 SEYDLER RD
LA GRANGE TX 78945-5800

JONATHAN COOK
1041 GROVE DR
ANGLETON TX 77515-5324

MAXINE COPPINGER
4030 FRANK RD
LA GRANGE TX 78945-5614

MATTHEW HAGENDORF
100 SHADY LN
COLUMBUS TX 78934-2032

HARVEY HAYEK
6149 BACA RD
FAYETTEVILLE TX 78940-5401

NORMAN & WANDA HUBBARD
7630 HARDCASTLE LN
LA GRANGE TX 78945-4506

SHANE JOHNSON
13420 CAPADOCIA CV
AUSTIN TX 78727-1404

RICKY KIRKLAND
3409 FOREST HILL EAST RD
LA GRANGE TX 78945-4401

SANDRA KLEIN
8415 MACH RD
LA GRANGE TX 78945-5603

VIRGINIA LEECH
558 S WASHINGTON ST
LA GRANGE TX 78945-3116

EUGENE MICHALSKY
506 E FRANKLIN ST
FAYETTEVILLE TX 78940-5525

RYAN RITTENHOUSE
1303 SAN ANTONIO ST
AUSTIN TX 78701-1636

JEFF ROBINSON
1445 ROSS AVE STE 1200
DALLAS TX 75202-2711

EVA THEIL
2216 SAN GABRIEL ST
AUSTIN TX 78705-5079

DAVID E WESTBROOK PO
BOX 50
WARDA TX 78960-0050

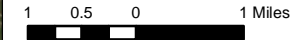
LCRA Application to Deflex Air Quality Permit # 51770 Locations of Three Closest Hearing Requestors



Protecting Texas by
Reducing and
Preventing Pollution

Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087

November 1, 2012



Projection: Texas Statewide Mapping System
(TSMS)

Scale 1:112,570

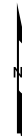
Legend

- ▲ Residences of Hearing Requestors
- LCRA Fayette Power Project Stacks

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the requestor addresses from the requestors. Point locations for these addresses was obtained using the MapQuest geocoding tools. The roads and cities data are from TeleAtlas/GDT Dynamap 2000 data. The background of this map is a one-half meter aerial imagery from the 2008 National Aerial Imagery Program (NAIP).

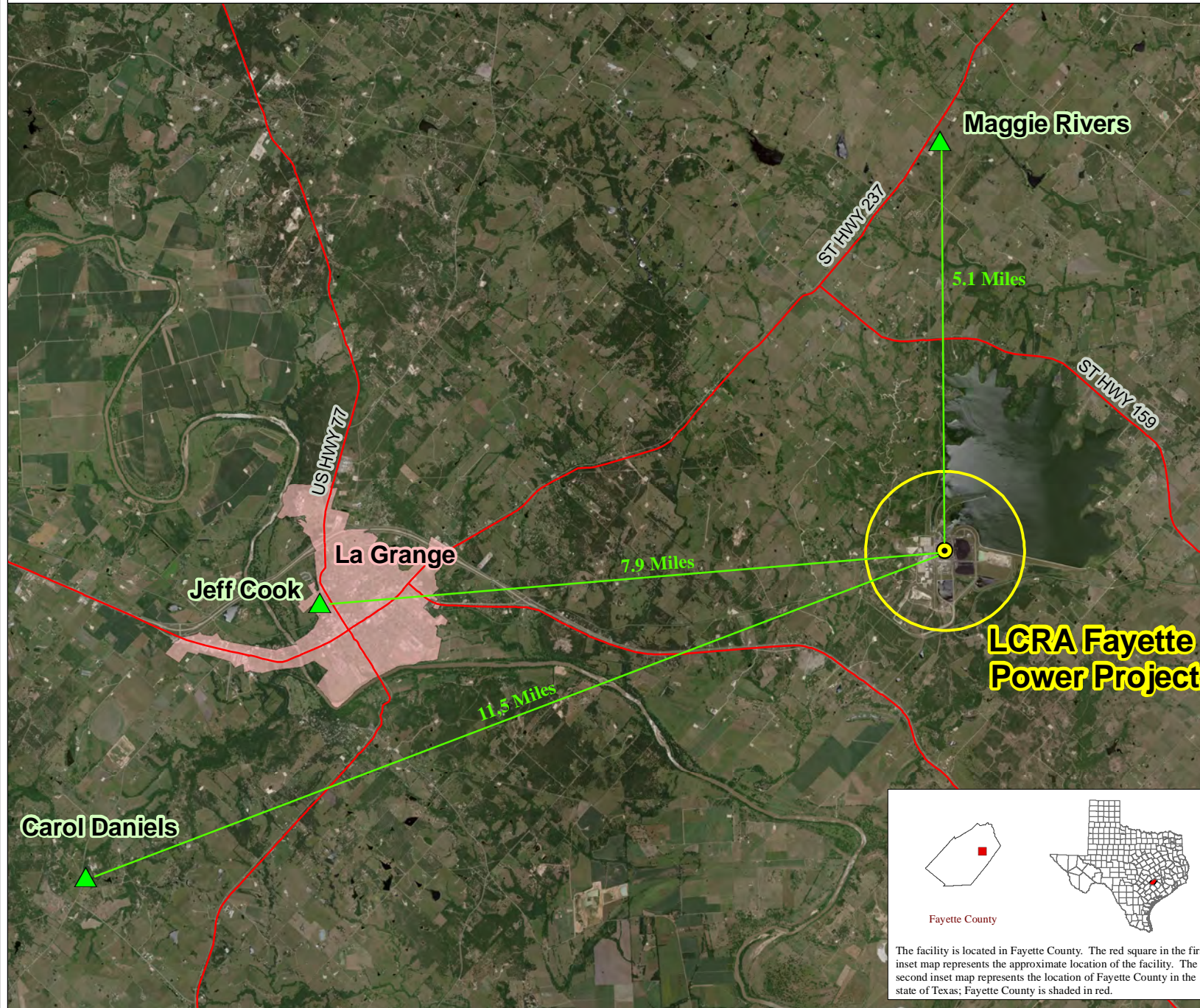
This map shows:

1. A point location representing the center of the primary three stacks at the LCRA Fayette Power Project
2. A one-mile radius surrounding the facility has indicated.
3. Geocoded locations for the residences of Jeff Cook, Carols Daniels, and Maggie Rivers.
4. Distances in miles from each residence to a point representing the stack area of the LCRA Fayette Power Plant



This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.

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Fayette County



The facility is located in Fayette County. The red square in the first inset map represents the approximate location of the facility. The second inset map represents the location of Fayette County in the state of Texas; Fayette County is shaded in red.